

disability benefits for a 63.5 percent work disability¹ for a 69 percent task loss and a 58 percent wage loss.

Respondent requests the Board to affirm the Judge's finding that claimant failed to establish he suffered an injury that arose out of his employment. In the event the Board finds that claimant did sustain a work-related injury as alleged, respondent argues that claimant suffered no increased functional impairment over his preexisting impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the March 18, 2009, Award should be affirmed.

Respondent employed claimant as a chain hand on an oil rig. Claimant alleges he injured his low back on September 14, 2006, shortly after commencing his shift. He testified, in part:

Q. (Mr. Stalcup) Yes. Describe what you were doing [on September 14, 2006].

A. (Claimant) We showed up, I work morning tower. Well, I used to work morning tower for [respondent] and showed up, little early. We changed our clothes. Had to make connection, and went up there, went to go pull on the slips and I felt something in my lower back and I didn't tell my boss right then and there, but I told him, like, five minutes later after we made the connection. We went back to the dog house and I told him I did something to my lower back and that was -- took it easy for the rest of the day, evening, night. Well, yeah, night.²

According to claimant, that incident at work prompted him to visit his family physician, Dr. Brad Smith, and request an MRI. The medical records, however, provide a very different history.

On August 8, 2006, approximately five weeks before claimant's alleged September 14, 2006, accident, claimant sought medical treatment at the St. Joseph Family Medicine clinic in Great Bend, Kansas. Claimant was seen by a nurse practitioner, Jenny Manry, and he complained of pain in his lower lumbar spine that he described as intermittent, throbbing, aching and stabbing, commencing two years before. Claimant was told to avoid lifting over five pounds, prescribed Ultram, and he was referred to

¹ A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

² R.H. Trans. at 12.

Dr. Bell Razafindrabe. The St. Joseph Family Medicine clinic's notes from the August 8, 2006, visit read, in part:

He complains of back pain. The location is primarily in the lower lumbar spine. It does not radiate. He characterizes it as intermittent, throbbing, aching, and stabbing. This is a chronic, but intermittent problem with an acute exacerbation. He states that the current episode of pain started 2 years ago. The event which precipitated this pain was carrying *[sic]* a heavy bit at work and he fell[,] did the splits and blew out his back. This occurred at work. Aggravating factors contributing to the back pain may be job-related repetitive lifting with back strain. He denies any associated symptoms. He has not found anything that helps relieve the pain. The pain worsens with back flexion and back extension. Patient was at work and he hurt his back[;] this happened appr. 26 months ago. He had surgery a year and a half ago. Dr. Amarani *[sic]* performed the surgery. He works in the oil field and so he has a hard labor job.³

Nothing in that history indicates claimant hurt his back in a specific incident while working for respondent.

On August 29, 2006, claimant saw Dr. Razafindrabe. Claimant described his low back pain as, among other ways, continuous, intermittent, stabbing, and unbearable. The doctor recorded the following history:

I was pleased when asked by Dr. Rodgman [from St. Joseph Family Medicine clinic] to see Mr. Stevenson. As you recall, Mr. Stevenson is a 27-year-old gentleman who presented to the clinic with pain in the back that has been bothering the patient for at least 2 years. The patient states that the back pain is currently aching, continuous, throbbing, intermittent, locking, miserable, sharp, shooting, stabbing, unbearable, 8/10 at least 3/10, average 5/10, and right now 6/10 associated with weakness of the lower back and thigh with both numbness and tingling. The patient stated that the pain localized across the lower back above the buttocks area, worse on the left side, worse during physical activity, even prolonged sitting, heavy lifting, rest, and sleeping. Patient states that the current pain and symptoms interfere with general activity, mood, walking ability, relation with other people 50 to 60% of the time. Patient had acute herniated disk about one-and-a-half years ago, was associated with radiculopathy, secondary to L4 disk protrusion, treated with surgery by Dr. Amarine *[sic]* which provided pain free for about 1 year and currently starting to have a tingling, numbness, and occasional aching of the back. Patient denies use of TENS unit, injection or any further surgeries since then. Patient is here for further back pain management.⁴

³ Estivo Depo., Ex. 4 at 1.

⁴ Razafindrabe Depo., Ex. 2 at 1.

Dr. Razafindrabe diagnosed claimant with failed back syndrome, degenerative disk disease that was currently symptomatic, and radiculitis of the L4-L5 dermatome of the left side. The doctor prescribed Lortab and physical therapy. There is no mention in Dr. Razafindrabe's August 29, 2006, report of either a recent injury or specific incident.

Moreover, on September 13, 2006, the day before claimant's alleged injury, claimant returned to the St. Joseph Family Medicine clinic and saw Dr. Brad Smith. Claimant described pain complaints similar to the description he had given to Ms. Manry on August 8, 2006. Claimant related to Dr. Smith that he had seen Dr. Razafindrabe and that physical therapy had been ordered. Claimant asked Dr. Smith to order an MRI, which was scheduled and performed on September 15, 2006.

Claimant, however, denied seeing Dr. Smith and Dr. Razafindrabe until after his September 14, 2006, accident.

There is no dispute, however, that claimant had an earlier workers compensation claim against a previous employer, Forrest Energy, L.L.C., for a May 2004 low back injury. Following that injury, claimant was off work for a year and a half and in March 2005 underwent surgery for the excision of a left herniated disk at L4-L5. Surgery was performed by Dr. Jacob Amrani, who released claimant from treatment with no restrictions. However, at his attorney's request, claimant was examined by Dr. Daniel D. Zimmerman in November 2005. Dr. Zimmerman opined claimant had an 18 percent whole person impairment and limited claimant's lifting to 50 pounds on an occasional basis and 25 pounds on a frequent basis. He also recommended that claimant avoid frequent bending, stooping, squatting, crawling, kneeling and twisting. Claimant settled the workers compensation claim for the May 2004 injury in late February 2006 based upon a 15 percent whole person impairment.⁵

Forrest Energy, LLC, did not return claimant to work. Consequently, claimant commenced working for respondent. It is not clear when claimant started with respondent as claimant testified he began working for respondent in either April or May 2006 but also testified he began working for respondent approximately 10 months before the alleged September 2006 accident.⁶ On the other hand, claimant wrote on a job application of another employer that he worked for respondent from October 2005 to March 2007.⁷ And

⁵ Estivo Depo., Ex. 2 at 1.

⁶ R.H. Trans. at 28.

⁷ *Id.*, Resp. Ex. 3.

a November 21, 2005, medical report prepared by Dr. Zimmerman indicates claimant began working for respondent approximately five weeks before seeing the doctor.⁸

Dr. Paul S. Stein, a board-certified neurosurgeon, examined claimant on February 16, 2007, at respondent's request. Claimant reported a 2004 injury, which resulted in surgery and a 90 percent improvement. He told Dr. Stein he had no permanent restrictions and no significant problems after surgery. Using the *AMA Guides*,⁹ Dr. Stein opined that claimant had previously been in at least DRE (Diagnosis-Related Estimates) Lumbosacral Category II (five percent whole person impairment), and possibly Category III (10 percent whole person impairment), after his 2004 injury and surgery. Dr. Stein also opined that at the time he evaluated him, claimant was in DRE Lumbosacral Category II. Therefore, in Dr. Stein's opinion, claimant had no increase in impairment under the *Guides* as a result of the alleged September 14, 2006, injury.

Upon reviewing claimant's medical records of August 8, August 29, and September 13, 2006, Dr. Stein indicated those records suggested that claimant did not provide an accurate history to him and that claimant's low back problems preexisted September 14, 2006. Regardless, Dr. Stein was of the opinion that claimant suffered no increase in any permanent impairment.

Dr. Stein recommended that claimant avoid lifting more than 40 pounds with any single lift up to twice a day, claimant could lift 30 pounds occasionally, and he could lift 15 pounds frequently but not continuously. Further, the doctor recommended that claimant should avoid repetitive lifting from below knuckle height and repetitive bending and twisting of the low back on a continuous basis. The doctor could not attribute his restrictions to either the 2004 or 2006 injuries, but could only say the restrictions were based on claimant's physical condition on February 16, 2007.

Dr. Daniel D. Zimmerman, a board-certified independent medical examiner, evaluated claimant on July 10, 2007, at the request of claimant's attorney. As indicated above, Dr. Zimmerman had previously examined and rated claimant in November 2005 in connection with claimant's previous low back injury. According to Dr. Zimmerman, the MRI performed on September 15, 2006, revealed that claimant had a central disk protrusion at L4-L5 that caused impingement on the thecal sac and narrowing of the canal. The doctor further noted the MRI indicated a moderate concentric bulging of the L5-S1 disk that narrowed the central canal, with impingement on the S1 nerve root. Additionally, the MRI indicated there was associated facet joint arthropathy leading to narrowing of the

⁸ Zimmerman Depo., Ex. 4 at 1.

⁹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

neuroforamina, left greater than right, with possible impingement of the left exiting nerve root at L5-S1.

Upon examination, Dr. Zimmerman found that claimant had radicular weakness in both lower extremities and that he had severe range of motion restrictions affecting the lumbosacral spine. Dr. Zimmerman opined that the permanent aggravation of claimant's lumbar disk disease was causally related to the injury he sustained while working for respondent in September 2006. He also stated, however, that claimant's weight, 368 pounds, might play a role in his complaints. Dr. Zimmerman testified that based on the *AMA Guides*, claimant has a 28 percent whole person functional impairment, of which 18 percent was attributed to claimant's previous injury and surgery and 10 percent was related to claimant's September 14, 2006, accident.

Dr. Zimmerman believed that claimant was capable of lifting 20 pounds on an occasional basis and 10 pounds on a frequent basis. Further, he recommended that claimant avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities. Moreover, after reviewing the list of former work tasks prepared by personnel consultant Jerry D. Hardin, Dr. Zimmerman indicated claimant's task loss would be the same whether using the restrictions he recommended in November 2005 or those he recommended in July 2007.

Dr. John P. Estivo, a board-certified orthopedic surgeon, examined claimant in early November 2007 at respondent's request. Claimant told Dr. Estivo that he had improved 90 percent after his March 2005 surgery. Claimant did not tell Dr. Estivo that he had sought medical treatment or an evaluation of his low back shortly before September 14, 2006. Dr. Estivo initially concluded claimant may have sustained a temporary aggravation of his low back condition in the alleged September 14, 2006, accident. But after reviewing the records from claimant's August 8, August 29, and September 13, 2006, visits to health care providers, the doctor concluded claimant's low back problems preexisted September 14, 2006. In short, Dr. Estivo did not believe claimant sustained any permanent impairment from his employment with respondent or that he needed any permanent work restrictions due to that employment.¹⁰

Judge Fuller ordered an independent medical examination by Dr. Terrence Pratt, who is board-certified in physical medicine and rehabilitation. Dr. Pratt examined claimant on February 18, 2008, and initially opined that claimant injured his low back in the alleged September 14, 2006, accident. But upon reviewing the medical records from claimant's August 8, August 29, and September 13, 2006, visits to health care providers, Dr. Pratt concluded claimant had low back pain before September 14, 2006, and that the alleged

¹⁰ Estivo Depo. at 12, 13.

September 14, 2006, accident was not responsible for his low back condition. The doctor opined the alleged September 14, 2006, accident was not responsible for any increase in claimant's permanent functional impairment.¹¹ Moreover, Dr. Pratt testified he believed it was more probably true than not that the changes noted on claimant's September 15, 2006, MRI were present before September 14, 2006.¹²

The Board agrees with the Judge that claimant has failed to prove he injured his back working for respondent. The evidence is overwhelming that claimant had significant low back symptoms before his alleged September 14, 2006, accident. Claimant did not litigate this claim as a repetitive trauma injury and no doctor testified that claimant injured his back in such manner. In short, claimant failed to carry his burden of proof.

K.S.A. 2006 Supp. 44-501(a) states, in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) defines burden of proof, as follows: "Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

In conclusion, the March 18, 2009, Award should be affirmed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the March 18, 2009, Award entered by Judge Fuller.

IT IS SO ORDERED.

¹¹ Pratt Depo. (Feb. 19, 2009) , at 13, 14.

¹² *Id.*, at 25.

¹³ K.S.A. 2008 Supp. 44-555c(k).

Dated this ____ day of August, 2009.

BOARD MEMBER

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c: Randy S. Stalcup, Attorney for Claimant
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Terry J. Torline, Attorney for Respondent and its Insurance Carrier
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